United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,236

51

EDNA EPSTEIN,

Appellant,

v.

SHIRLEY MESHER,

Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

NATHAN L. SILBERBERG

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Attorney for Appellant.

QUESTIONS PRESENTED

1. Is one designated in a will as a stepdaughter entitled to citation when the will is offered for probate?

2. Is equitable adoption recognized in the District of Columbia?

3. Should the District Court appoint a guardian ad litem for an heir-at-law when informed that he is incapable of managing his own affairs?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Within six months of the probate of the will of Jacob Voronoff in the United States District Court for the District of Columbia, Appellant filed a petition for a caveat, as provided in Secs. 19-301 et seq., D. C. Code. Upon denial of such petition, an appeal was taken to this Court, which has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

Jacob Voronoff died in the District of Columbia on September 11, 1962. A writing purporting to be his will, executed June 23, 1962, was filed with the Register of Wills of the District Court on October 19, 1962. The executrix named therein, Shirely Mesher, is sole beneficiary, except for a half-interest in one piece of real property left to her brother, Joseph Voronoff.

She filed a petition for probate on January 3, 1963, alleging that her said brother and she were the only heirs-at-law. Joseph's alleged consent was also filed. Letters testamentary were issued to her on February 8, 1963.

The alleged will provides, "It is my intention not to make any provision in my Will for my stepdaughter, Edna Epstein." No citation was issued to her.

On June 13, 1963, Edna Epstein of Ithaca, N. Y., filed a petition for a caveat, alleging she was a daughter of the decedent and contesting the alleged will on the grounds of his unsoundness of mind, that he was subjected to undue influence and that Joseph Voronoff needed the protection of the Court because he was incapable of managing his own affairs.

In response to Interrogatories, Edna Epstein set forth, under oath, that, after the death of her natural father, David Novidwor, her mother had married Jacob Voronoff in 1913, when Edna was five years old; that she knew of no court proceedings of option but that, from her earliest recollection, Jacob had treated her as his daughter; that the public school records showed her name was changed from Edna Novidwor to Edna Wornoff a year after the remarriage; that the school records showed Jacob Voronoff as "parent or guardian"; that in the 1920 Census she was listed as Edna Voronoff, daughter, age 11, enumerated in the family of Jacob and Fannie Voronoff; that Mr. and Mrs. Jacob Voronoff publicly announced her engagement as their daughter and arranged and paid for the wedding ceremony in 1927.

Without hearing any testimony, the Court granted the executrix's motion to dismiss the caveat but "without any prejudice against the right of the son named by counsel to initiate such proceedings as may be desirable from his viewpoint."

STATUTES INVOLVED

> **Sec. 19-301, D. C. Code** -- Upon the filing of a petition for probate of a will, notice, as hereinafter provided, shall be issued to all persons who would be entitled to or interested in the estate of the testator in case such will had not been executed to appear in said court on a date named in the notice, and to show cause why the prayer of the petition should not be granted. . . .
>
> **Sec. 19-302, D. C. Code** -- Any person, although not cited, who may be interested in sustaining or defeating the will may appear and support or oppose the application to admit the same to probate.
>
> **Sec. 19-303, D. C. Code** -- Whenever it shall appear that any party interested as aforesaid is . . . non compos, the court shall appoint a guardian ad litem to represent said party at the hearing of the application to admit the will to probate, and with authority to file a caveat, as he may be advised, in behalf of said party.
>
> **Sec. 19-308, D. C. Code** -- After a will has been admitted to probate, any person in interest shall have six months from the date of the order of probate in which to file a caveat to said will, praying that the probate thereof be revoked.

STATEMENT OF POINTS

1. Stepdaughter was denied her right to a citation when the alleged will was offered for probate.

2. Stepdaughter has a right to prove that she was equitably adopted by the testator and, thus, entitled to caveat.

3. The District Court should have appointed a guardian ad litem for an incompetent heir.

SUMMARY OF ARGUMENT

1. Citation for probate should include any person having possible interest in estate, regardless of how such person is termed in the alleged will.

2. A child taken into a home and raised as if she were the householder's child is deemed to have been adopted by him, even though he failed to take the legal steps for an adoption.

3. When the mental limitations of an heir-at-law are brought to the Court's attention, a guardian ad litem should be appointed to ascertain whether that heir is competent to protect his own rights.

ARGUMENT

I.

"STEPCHILD" ENTITLED TO CITATION

The alleged will identified Appellant as "my stepdaughter". No citation was served upon her and no notice afforded her that the writing was being offered for probate.

Although Sec. 19-301, D. C. Code, provides for notice "to all persons who would be entitled to or interested in the estate of the testator in case such will had not been executed," Appellant, a non-resident, was kept in the dark, presumably because that writing labeled her as something other than what she was.

Inasmuch as the law, itself, specifically opens the door to challenge a "will", does its language determine who shall receive notice? If so, a fraudulent document may escape challenge simply by such mislabeling.

Had not Petitioner learned of the probate from independent sources, within the time the law allows for a caveat, she might have been forever silenced and a perfect fraud would have been perpetrated.

II.

EQUITABLE ADOPTION GENERALLY RECOGNIZED

So far as our research has uncovered, the doctrine of equitable adoption has not previously been before this Court. However, the District Court ruled in favor of such an adoption in Estate of Linnie G. Finney (1954), Administration No. 81,052. That will referred to "my adopted son" and left only $1.00 to the latter's son. This "grandson" claimed all property which had not been disposed of by will but, as here, the executor objected because there had been no compliance with the adoption statute of the District.

Judge Holtzoff approached it upon equitable grounds: If prospective adoptive parents make a contract to adopt a child, take him into their household and treat him as though he were a member of the family, as though an adoption had taken place, although no formal adoption was ever consummated, equity will regard as done that which should have been done, so such child was considered as having been adopted:

> The Court is therefore of the opinion that Roy A. Finney should be treated as though he had been adopted by testatrix, even though a formal adoption had never been consummated. . . . Thus, the claimant is entitled to the same share of the estate as he would have received had he been a natural descendent of the testatrix.

The Eighth Circuit Court considered the problem in a Missouri case, Roberts v. Roberts (1915), 223 F. 775, 776 (cert. den., 239 U.S. 639), and came to the same conclusion:

> The argument by which we are asked to reverse the decree is that there was no direct and clear evidence of an agreement to adopt at the time Myra J. Roberts was received into the family of Charles J. Roberts. There is good reason why such evidence is wanting. All of the parties to the transaction are dead, and Myra J. Roberts was herself a babe at the time of the adoption. It seems to us that in such a case it is not necessary that the court first have direct proof of the making of the contract, and then proceed forward from the contract thus established

> to the contract evidencing its existence. We think it is possible to revise that process, and if the statements and conduct of the adopting parents are such as to furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as an inference from that evidence.

This was cited recently by the New Jersey Superior Court in Ashman v. Madigan (1956), 122 A 2d 382, virtually ignoring the original contract theory in these cases. The "adoptee" had been taken from a foundling home at 3 by the intestate and her husband, who baptized her as their child but did not carry out a legal adoption. Sustaining a decree for the "adoptee", that Court said (p. 383):

> I am also of the opinion that the evidence justifies the inference that there was an agreement by the decedent to adopt the plaintiff, which agreement this court has power to enforce. There was no direct evidence of such an agreement but this is unnecessary, if, as here, the statements and conduct of the adopting parents are such as to furnish clear and satisfactory proof that an agreement of adoption must have existed.

An earlier New Jersey case, Burdick v. Burdick (1933), 168 A. 186, dealt with facts similar to those here raised. The intestate had married the plaintiff's widowed mother. He died 39 years later, leaving no other issue. The plaintiff claimed the intestate had agreed to adopt him but had not done so formally:

> It is now firmly established that an oral agreement to adopt, where there has been a full and faithful performance on the part of the adoptive child, but which was never consummated by formal adoption proceedings during the life of the adoptive parent, will, upon the death of the latter, and when equity and justice so requires, be enforced to the extent of decreeing that such child occupies in equity the status of an adopted child, entitled to the same right of inheritance from so much of his foster parent's estate that remains undisposed of by will or otherwise, as he would have been had he been a natural born child.

In the instant case, Appellant asks only the right to challenge the validity of the alleged will. She has been precluded from presenting

evidence because her adoption was not formally consummated. Once she has had her day in court, if the jury finds that the will was the true testament of the testator and that it was his intent to disinherit her, she asks no further remedy. However, the trial court has denied her that opportunity:

> The Court believes that the statute creates an exclusive method for the legal adoption of children. (J.A. 15).

Missouri also had an adoption statute but its court, in Hollaway v. Jones (1922), 246 SW 587, stated that this would not prevent enforcement of the rights of an equitable adoptee:

> . . . one who takes a child into his home as his own, receiving the benefits accruing to him on account of that relation, assumes the duties and burdens incident thereto, and . . . where justice and good faith require it, the courts will enforce the rights incident to the statutory relation of adoption. The child having performed all the duties pertaining to that relation, the adopting parent will be estopped in equity from denying that he assumed the corresponding obligation. In equity, it will be presumed that he did everything which honesty and good conscience required of him in justification of his course. Equity follows the law except in those matters which entitle the party to equitable relief, although the strict remedy of law be to the contrary. . . .
>
> But since the statute has made the adoption of a child lawful, the law, for the same reasons that it sometimes enforces oral contracts affecting real estate, will not allow the mere failure of one party to do his duty to work an irreparable wrong to one who has fully performed his part.

The instant Appellant makes no such charge against the decedent, although she was a good and faithful daughter. She seeks only to prove that the presumed act of disinheritance was not the act of the only father she ever knew, but the device of others working upon the troubled mind of a bereaved widower.

III.

GUARDIAN AD LITEM NECESSARY

Although it was not for her personal benefit, Appellant, in her petition for a caveat, alleged that her brother, Joseph Voronoff, was incapable of managing his own affairs and suggested that a guardian ad litem be appointed for him.

The record discloses that Joseph apparently had waived citation and consented to the probate, although the purported will gives him only a half-interest in one piece of real property and everything else to Appellee.

Sec. 19-303, D. C. Code, provides:

> Whenever it shall appear that any person interested as aforesaid is . . . non compos, the court shall appoint a guardian ad litem to represent said party. . . .

The trial court did take note of this situation, but only to the extent of dismissing Appellant's petition "without any prejudice against the right of the son named by counsel to initiate such proceedings as may be desirable from his viewpoint" (J.A. 15).

If the Court does not see fit to act, who is to do so? Certainly not the son in question nor Appellee, who obviously obtained his alleged consent. Appellant is a comparative stranger to that phase and her allegation did not sufficiently move the court.

Mersch saw fit to amend his Probate Court Practice (2d ed., Vol. 1, Sec. 961), to state, "Sect. 19-303 of the Code apparently encompasses all persons who are known to be non compos mentis, whether judicially declared so or not," after this Court's decision in Merchant v. Davies (1957), 100 App. D.C. 258, 244 F.2d 347.

There the will had been probated in 1953. The testatrix's son was later declared an incompetent and a committee, appointed in 1955, sought to caveat upon the grounds that the son was incompetent when the will

was probated. This Court initially sustained the dismissal of his petition because it had been filed after the time allowed in Sec. 19-309. Upon rehearing, however, this Court remanded the matter to the District Court to permit the committee to allege his petition to set forth in detail his allegation of fraud on the part of the proponents when they failed to set forth the son's true condition in their petition for probate.

If, in the instant case, the trial court felt there was no substance to the allegation as to Joseph's competency, it might have ignored that. But it recognized for a moment that perhaps something should be done, then left the matter so that nothing would be done.

CONCLUSION

The order of dismissal should be reversed and the caveat permitted to go to trial.

Respectfully submitted,

NATHAN L. SILBERBERG

1001 Pennsylvania Building
Washington, D. C., 20004

Attorney for Appellant.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Administration of)
ESTATE OF JACOB VORONOFF,) Administration No. 107,519
Deceased.)

RELEVANT DOCKET ENTRIES

Date	Proceedings
	Wills # 572 folio 472
1962	
Oct. 19	Will dated June 23, 1962 naming Shirley Mesher executrix, filed with affidavit relative thereto.
Nov. 8	Will fully proved.
1963	
Jan. 3	Petition of Shirley D. Mesher for probate and record of will as to real and personal estate and for letters testamentary with special undertaking, filed.
Jan. 24	Citation issued against Joseph Voronoff. Return day - February 5, 1963.
Jan. 29	Citation returned - Joseph Voronoff served personally.
Feb. 8	Order admitting will to probate and record as to real and personal estate and granting letters testamentary to Shirley D. Mesher, named in will as Shirley Mesher. Undertaking - $6,500.00.
Feb. 26	Oath of executrix. Undertaking executed. Undertaking approved and letters issued. Undertakings #176 folio 431.
May 6	Notice to executrix of citation to issue for inventory of money and debts.
June 13	Petition of Edna Epstein for caveat, filed.
June 14	Certificate of mailing of petition for caveat, filed.
June 19	Motion of executrix to dismiss caveat, filed with certificate of mailing. Memorandum of points and authorities in support of petition to dismiss caveat, filed with certificate of mailing.
June 20	Motion of Shirley D. Mesher, by her attorneys, for costs, filed with memorandum of points and authorities and certificate of mailing.

1963

June 21 Inventory of money and debts, filed.

June 24 Opposition of caveator, by her attorney, to motion to dismiss caveat, filed with certificate of mailing.

June 27 Interrogatories from Alvin L. Newmyer to Edna Epstein, filed with certificate of mailing.

July 5 Objections of caveator, by her attorney, to interrogatories, filed with certificate of mailing.

July 5 Interrogatories of caveator, by her attorney, addressed to caveatee, filed with certificate of mailing.

July 5 Order directing caveator, within 10 days from the date of this order, to deposit $50.00 with the Register of Wills or in lieu thereof to file undertaking in the amount of $100.00.

July 9 Memorandum of points and authorities in answer to caveator's objections to interrogatories, filed with certificate of mailing.

July 9 Memorandum of points and authorities in opposition to caveator's request for an extension of time, filed with certificate of mailing.

July 15 Motion of caveatee, by her attorney, objecting to interrogatories and for extension of time, filed with memorandum of points and authorities and certificate of mailing.

July 25 Undertaking for security for costs in the amount of $100.00 approved. Undertakings # 178 folio 176.

July 29 Order overruling opposition to interrogatory; directing caveator to file answers to interrogatories 1 through 9 on or before August 31, 1963, and continuing consideration of motion to dismiss caveat, etc., until after August 31, 1963. Seen.

Aug. 26 Answers to interrogatories by Edna Epstein, filed with certificate of mailing.

Sept. 11 Order granting motion to dismiss and said petition for caveat is dismissed with costs.

Oct. 9 Notice of appeal of Edna Epstein, by her attorney, from Court order of September 11, 1963, filed. Cost Bond on Appeal in the amount of $250.00, filed. Undertakings #178 folio 663.

Oct. 10 Notice of Appeal from Nathan L. Silberberg, attorney for Appellant, mailed to Alvin L. Newmyer, Sr., Esq.

Oct. 25 Designation of record on appeal, filed with c/m.

Oct. 29 Order authorizing procurement of naturalization records. c/m

Oct. 30 Additional designation of record on appeal, filed with c/m

Nov. 4 Exhibit, filed.

[Filed June 13, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Administration of ESTATE OF JACOB VORONOFF, Deceased.	))))	Administration No. 107,519

PETITION FOR CAVEAT

The petition of Edna Epstein respectfully represents to this Court:

1. That she is an adult citizen of the United States of America, residing in the City of Ithaca, N. Y., and that she is a daughter of Jacob Voronoff, deceased.

2. That she received no notice that a paper writing, dated the 23rd day of June, 1962, and purporting to be the last will and testament of said Jacob Voronoff, had been filed with this Court and had been admitted to probate as such last will and testament on the 8th day of February, 1963.

3. That her interest and that of her brother, Joseph Voronoff, will be seriously affected by the probate of said purported will; that she hereby contests the probate and the validity of said paper writing as the last will and testament of Jacob Voronoff, deceased, upon the following grounds:

a. That said paper writing bearing the date June 23, 1962, is not the last will and testament of said deceased.

b. That said deceased was not, at that time, of sound mind and memory or in any respect capable of making a will.

c. That, upon information and belief, the alleged execution of said writing was obtained from said Jacob Voronoff by fraud and deceit exercised upon him by persons unknown to Petitioner.

d. That, upon information and belief, the alleged execution of said writing was obtained from said Jacob Voronoff by the undue influence, duress and coercion exercised upon him by persons unknown to Petitioner.

e. That Petitioner was given no notice that this writing or any other purporting to be the last will and testament of her said father was in existence or that the same was to be presented to any court for probate.

f. That, upon information and belief, Petitioner's brother, Joseph Voronoff, is and has been incapable of managing his own affairs or of knowing the meaning and significance of the purported will and testament as it concerns him and others.

WHEREFORE, the premises considered, Petitioner prays:

I. That process issue from this Court requiring the parties in interest to answer the exigencies of Petitioner.

II. That a guardian ad litem be appointed by this Court to protect the rights of Petitioner's brother, Joseph Voronoff.

III. That the probate granted said paper writing may be revoked.

IV. That a collector of the estate of the deceased be appointed to serve under bond until the termination of this caveat proceeding.

V. That issues be framed to be tried by a jury to determine the facts with respect to the execution and the validity of the alleged will.

VI. And for such other and further relief as to the Court may seem meet and proper.

/s/ Edna Epstein

STATE OF NEW YORK
COUNTY OF TOMPKINS, to wit:

I, Edna Epstein, do solemnly swear that I have read the foregoing Petition by me signed and know the contents thereof; that the statements therein made of my personal knowledge are true, and those made as upon information and belief, I believe to be true.

/s/ Edna Epstein

[JURAT dated June 11, 1963]

/s/ Nathan L. Silberberg
Attorney for Petitioner

* * *

[Filed June 19, 1963]

MOTION TO DISMISS CAVEAT

Comes now Shirley D. Mesher as the duly qualified and acting Executrix of the Estate of Jacob Voronoff, deceased, by her attorney, and moves the Court to dismiss the caveat filed herein to the will of said decedent dated June 23, 1962, and heretofore admitted to probate and record as the last will and testament of Jacob Voronoff, deceased, on the following grounds, namely:

It does not appear from said caveat that the caveator, Edna Epstein, has such an interest in the estate of said decedent as to entitle her to file a caveat to said will.

Annexed hereto is a Memorandum of Points and Authorities in support of this Motion.

NEWMYER & NEWMYER
By /s/ Alvin L. Newmyer
Attorneys for Executrix
* * *

[Certificate of Service]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Petitioner alleges an interest in the estate, claiming to be a "daughter of Jacob Voronoff, deceased", when in fact she is a step daughter and is so designated in Paragraph 6 of decedent's will, and as such has no interest in his said estate.

D. C. Code, Section 18-101; Section 18-703; Section 19-302;

Angell vs. Graff, 42 App. D. C. 198.

NEWMYER & NEWMYER
By /s/ Alvin L. Newmyer
Attorneys for Executrix
* * *

[Certificate of Service]

[Filed June 27, 1963]

INTERROGATIONS PROPOUNDED BY CAVEATEE TO EDNA EPSTEIN PURSUANT TO RULE 33 F.R.C.P.

1. State the date and place of your birth.

2. State the name of the natural father to whom you were born.

3. State the date and place of your marriage to Norman Epstein.

4. Do you have a son named David Epstein, and, if so, state his address.

5. For whom was your son David named?

6. Is it not a fact that you were born of a marriage between your mother and her first husband whose name was David Novidivar and that after your father's death, your mother later married the testator, Jacob Voronoff?

7. Do you claim that you are a daughter of Jacob Voronoff by reason of adoption or by birth?

8. If your answer to the preceding question is "by adoption" state when and where and designate the court proceedings in which your adoption occurred.

9. State the facts upon which you claim that you were legally adopted by Jacob Voronoff.

10. Upon what information do you allege that Jacob Voronoff was not of sound mind and capable of making a will?

11. Upon what information do you base the claim that the execution of Jacob Voronoff's will was obtained by fraud and deceit?

12. Upon what information do you base the claim that the will of Jacob Voronoff was executed by him as a result of undue influence, duress and coercion?

NEWMYER & NEWMYER
By /s/ Alvin L. Newmyer
* * *
Attorneys for Caveatee

[Certificate of Service]

[Filed August 26, 1963]

ANSWERS TO INTERROGATORIES PROPOUNDED BY CAVEATEE

STATE OF NEW YORK

COUNTY OF TOMPKINS, to wit:

1. I was born January 11, 1908, in Brooklyn, New York.

2. My natural father was David Novitwall, also known as David Novidwor.

3. I was married to Norman Epstein on April 19, 1928, in Washington, D. C.

4. My son, David Epstein, resides at 15 Lake Street, Dryden, New York.

5. He was named after my natural father.

6. After the death of my natural father, my mother married the testator, Jacob Voronoff.

7. I am a daughter of Jacob Voronoff by adoption.

8. There were no court proceedings of adoption, to the best of my knowledge.

9. My mother's marriage to the testator occurred Feb. 27, 1913. From my earliest recollection, I considered Jacob Voronoff as my father and was treated by him as his daughter. It was not until many years later that I learned that he had not been my natural father. At the schools I attended in Washington, the records show that my name was changed from Edna Novidwor to Edna Wornoff in the 1914-15 school year and that my "parent or guardian was listed as Jacob Voronoff, grocer, 1223 25th Street, N.W." The spelling of the last name was changed in the school records to Voronoff for my father and myself, beginning with the 1915-16 school year. In the 1920 census, I am listed as Edna Voronoff, Daughter, Age 11, enumerated in the family of Jacob and Fannie Voronoff." In the newspapers published in Washington in November and December, 1927, there appeared the announcement of "the engagement of Miss Edna Voronoff, daughter of

Mr. and Mrs. Jacob Voronoff," to Norman C. Epstein. The wedding was solemnized April 19, 1928, in the Jewish Community Center of Washington in a ceremony arranged by and paid for by the same Jacob Voronoff.

/s/ Edna Epstein

[JURAT dated August 20, 1963]

[Certificate of Service]

TRANSCRIPT OF PROCEEDINGS OF HEARING ON MOTION

Washington, D. C.
1 Wednesday, September 11, 1963

The above-entitled matter came on for hearing on Motion to Dismiss the Petition for Caveat before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia.

APPEARANCES:

ALVIN L. NEWMYER, ESQ., Attorney for Caveatee

NATHAN L. SILBERBERG, ESQ., Attorney for Caveator

3 THE DEPUTY CLERK: Estate of Jacob Voronoff.

THE COURT: Mr. Newmyer, I believe you are the moving party in this matter.

MR. NEWMYER: Yes, Your Honor.

ARGUMENT IN SUPPORT OF THE MOTION BY MR. NEWMYER

MR. NEWMYER: This is a motion filed to dismiss a petition for caveat. The petition was filed upon the allegation therein that the petitioner was a daughter of the decedent.

It developes from answers to interrogatories which she has made, after objections to them had been overruled, that she was in fact not a natural daughter but is claiming that she was an adopted daughter. She admits that there was no court proceeding for adoption.

The first statute of adoption in the District of Columbia was enacted February 26, 1895, and there has been a statutory method of adoption from that time up to the present.

According to her answers to the interrogatories, she was born in 1908. The first adoption law was in force at the time she was born and was in force up to the time that she married, from 1908 when she was born
4 until she was married in 1928. So for those 20 years, the statute provided a method by which an adoption could take place.

Your Honor takes judicial notice of the records of this Court and I direct Your Honor's attention to the records of this Court in the naturalization case shown in Docket 57, In re The Naturalization of Jacob Voronoff. He was naturalized September 7, 1926.

In 1926, the petitioner was 18 years old. In his petition for naturalization, he swore to his family relationship and he lists as his only children his two natural daughters. If he had intended an adoption of this party, certainly, when he filed this petition and was naturalized in 1926, he would have specified her as a daughter by adoption, all of which indicates there was never any intention on his part to adopt her as a daughter.

Now, the probate law provides under Title 19-307 of the Code that any party in interest may file a caveat. Her claim as to being a party in interest is based upon the allegation that she was a daughter by adoption.

Since there was a statutory provision by which adoption could be accomplished during the entire period of her lifetime and she admits in her answers to interrogatories that there were never any court proceedings for adoption, it is our contention that she cannot be considered as an adopted daughter.

5 Now, in objection to this rule at the former hearing, counsel for the petitioner cited an unreported opinion made in the probate case of The Estate of Finney, Administration No. 81052, in which Judge Holtzoff discusses the question of an equitable adoption. But the difficulty about that case and its application to this one is the fact that in the Finney case, in which the alleged adoption was under contract of adoption, a written contract made by the Home for Foundlings in the District of Columbia and that

in 1892, there was no statutory way by which an adoption could be accomplished and there was then a contract between the Home for Foundlings and the parent of the applicant in this case whereby he agreed to adopt him. But since that situation arose before an adoption statute, it has no application to this; and further, the cases which were cited in support of the principle that it could be applied here are entirely to the contrary; and further, this Court has since, and the adoption statute was passed, in a similar case denied that there was a legal adoption.

I refer Your Honor to the case of American Security and Trust Company against Cramer reported in 175 Federal Supplement at page 367, decided in 1959 by Judge Youngdahl. In that case, there were proceedings
6 by a testamentary trustee for instructions concerning a testamentary trust and on summary judgment, it was held that there was no adoption in accordance with the statute and, hence, the claim that the person who was making a claim under the will was an heir was denied.

In that case, the Court said this:

"It is clear from the transcript of the hearing that Hannah" -- that is the alleged adopted daughter -- "was treated by the testator and his wife just as if she were their natural daughter. She lived with them, was always referred to as 'our daughter', and used their name. Her formal wedding invitation referred to her as the Hazens' daughter; the community believed she was the Hazens' natural daughter. While there is little testimony on the question of whether she was ever legally adopted, what there is, leads to the conclusion that she had not been. Moreover, it would appear that it was impossible for her ever to have been legally adopted since the original adoption statute provided for the adoption of 'minor children' only." The original statute for the adoption of minor children was passed in 1895 when she was 26 years of age.

7 Now, in the answers to interrogatories, the petitioner bases her claim that she is the daughter upon these allegations: She said, "From my earliest recollection, I considered Jacob Voronoff as my father and was treated by him as his daughter. It was not until many years later that I learned that he had not been my natural father. At the schools I attended

in Washington, the records show that my name was changed from Edna Novidwor to Edna Wornoff" -- incorrectly spelled -- "in the year 1914-15 school year and that my 'parent or guardian was listed as Jacob Voronoff, grocer.'"

She was listed under the name Edna Voronoff in the city directory, she said, and in the newspapers when there was an announcement of her engagement as the daughter of Mr. and Mrs. Jacob Voronoff. There was no question that she was the daughter of Mrs. Voronoff by a previous marriage and she was raised by Mr. Voronoff in the house with their other children born of his marriage to her mother, but there was never any legal adoption or any claim of any legal adoption, nor does she claim that there was ever any agreement to adopt her or any contract. She doesn't say that. She doesn't say that he ever agreed to adopt her.

So, there is no claim here that this claim of adoption is based on even a contract of adoption.

8 But with respect to that,it is well settled in the District by decisions in the District and I refer to In re Adoption of a Minor, 79 U. S. Appeals page 191, reported also in 156 A.L.R. at 1001, that an adoption doesn't exist at common law, it is purely a creature of statute. The relationship of stepparent conferred no right and imposed no duties.

Now, it is interesting to note that the case which Judge Holtzoff cited in his opinion which he rendered before there was an adoption statute, a Maryland case, Besche v. Murphy, reported at 190 Maryland at page 539. That case recognized the same rule as applied by Judge Youngdahl in the District of Columbia that there was no and could not have been any legal adoption.

In this case, the Court said with respect to the relationship of this girl in the household -- and they cite numerous cases to the same effect -- that merely the generosity or willingness of a man to take his stepdaughter into his home and to raise her as one of the family and the fact that although there was a provision by law whereby he could have adopted her had he intended to do so during the entire period of her life, he never took any such

proceedings and refers to her in the will which he made which is here in dispute as his stepdaughter, all indicate plainly that there was never any
9 agreement or intention to adopt her and that she was never legally adopted and is, therefore, not an heir of this man and has no interest in his estate or right to file a caveat.

I have numerous other cases and citations to the same effect, but I think this is sufficient presentation, if the Court please.

THE COURT: Very well.

ARGUMENT IN OPPOSITION TO MOTION

BY MR. SILBERBERG

MR. SILBERBERG: May it please the Court, I was not aware until the citation a moment ago by Mr. Newmyer of the naturalization record. If it states as he says -- and I have no reason to challenge his word -- there are, then, four or five written evidences of declarations or indications by the testator as to how he regarded this child who is my client. These are expressions which occurred in a period from 50 to 30 years ago, a gentleman who was foreign born of limited education and limited knowledge, as the evidence will show, of what the law was, whether an 1897 law or a 1910 law.

It seems to me that there is a factual question which is of the type that the Court of Appeals has said must be resolved by a jury.

10 THE COURT: What is the factual question?

MR. SILBERBERG: As to whether he had in fact adopted the petitioner as his daughter.

THE COURT: Mr. Newmyer says that in answer to the interrogatories or in the deposition, the caveator has said that there were no court proceedings.

MR. SILBERBERG: That is correct, sir.

THE COURT: Are you finding an equitable adoption?

MR. SILBERBERG: That is correct, sir, and the equitable adoption as outlined in the 1954 opinion by Judge Holtzoff was not based solely upon the contract or alleged contract, to which Mr. Newmyer has referred, but

upon a course of conduct on the part of the so-called adoptive parent.

THE COURT: Was this course of conduct prior to the enactment of the first adoption statute in the District of Columbia?

MR. SILBERBERG: I believe it was both before and after. The language of the opinion -- and it was a bench opinion, it was a 1954 opinion -- is to the following effect and I have not copied it precisely: The Court says the question is whether we have equitable adoption recognizable in the District of Columbia, that is, if a prospective adoptive parent makes a contract to adopt a child, takes him into his household and treats him as
11 though he were a member of the family as though an adoption had taken place but actually no formal adoption had been consummated, is such a child to be treated as though he had been legally and lawfully adopted? Judge Holtzoff says that the majority of states hold in the affirmative, that equity will be regarded as done that which should have been done.

He points out that there was no decision on the subject in the District of Columbia up until that time. But he does refer to the Maryland case of Besche v. Murphy, 59 Atlantic 2d 499, to which Mr. Newmyer has referred the Court wherein there is a very lengthy discussion by that Court of Appeals in dictum but nevertheless rather exhaustive as to the effect of the treatment by a family of a child as though he had been adopted and as to the rights of inheritance from the estate of the so-called parents.

I respectfully submit that a factual issue within the framework of the doctrine of equitable adoption is therefore set forth by what is now before the Court.

The petitioner, my client, was a child of three at the time of the death of her natural father. Her mother remarried approximately two years thereafter. She was at that time already enrolled in the public schools of the District of Columbia. I may be one year off in my age.

12 Suffice it to say that her original enrollment in the District of Columbia schools was under the name of her natural father. Thereafter, within the year after the remarriage of her mother occurred and when she was at best six or seven years old, there was a change of the school

records to show the change of name from Novidwor to Wornoff, but misspelled, and the listing of parent or guardian which is what the form then provided, as Jacob Voronoff.

From that time on for the balance of her schooling which continued, always in the District of Columbia, into the 1920's, she was registered each year as Edna Voronoff and the parent or guardian was the same Jacob Voronoff who is now the testator.

There occurred in 1920 a census and the census records of the Department of Commerce show this child, then 13 years old, as being the daughter of Jacob Voronoff.

Next is the newspaper announcement of the engagement which occurred in 1927 in which she is identified as the daughter of Mr. and Mrs. Jacob Voronoff.

The wedding occurred in 1928 and we are prepared to show by testimony that this was arranged and paid for by the testator.

It seems to me that in the face of these circumstances, these positive holdings, these representations by the testator as to this being his child,

13 and these necessarily having been his actions because of her immature years throughout this period, that there is created a question of fact which, as I have stated, should be submitted under proper instructions to a jury.

I do not believe that the statutory adoption, as I read the opinion -- I have not read the opinion by Judge Youngdahl, I was not aware of that one; I would want to examine that -- but as I read Judge Holtzoff's opinion, clearly he at least accepts the doctrine of equitable adoption as applicable in the District of Columbia.

I would call to the Court's attention that separate and apart from the position taken by my client as concerns herself in her petition, she has set forth that the interest of her brother, who is without question the natural child of the testator, will be seriously affected by the probate of the purported will and that she respectfully requests among her prayers the appointment of a guardian ad litem for him because he is unable to protect his own interests. She has no direct standing in that regard

because he is an adult and he has not been, so far as I know, at any time been judicially determined to be an incompetent. She does suggest to the Court that his interests require independent protection. This has not been

14 dealt with by Mr. Newmyer today, nor was it considered by the Court upon the earlier hearing of this motion.

I respectfully submit, therefore, that on the basis of these prior rulings, that an issue triable by a jury under proper instructions of the Court is presented; that given the opportunity, and we have had comparatively little time within which to develop that which we have here, that we hope to be able to find persons still living who were present at the time of the marriage of the testator to the petitioner's mother as to the circumstances which led to that marriage as to any promises, agreements, oral contracts or otherwise which were made.

Now, this, of course, occurred 50 years ago and there has not been sufficient time for me to find such persons. I think that there is one such person now residing in Florida. I have reason to believe that his testimony on this score would be of importance. I am not in a position to make any representation to the Court as to what that testimony would be because I have not yet spoken to the prospective witness in question.

For these reasons, I respectfully urge the denial of the motion to dismiss and I would ask the Court also to consider the appointment of a guardian ad litem for the protection of the interests of the brother Joseph Voronoff.

15 ORAL RULING OF THE COURT

THE COURT: The Court believes that the statute creates an exclusive method for the legal adoption of children.

The Court will grant the motion to dismiss the caveat. I will do so without any prejudice against the right of the son named by counsel to initiate such proceedings as may be desirable from his viewpoint. The Court will grant the motion.

MR. NEWMYER: I have an order, Your Honor.

(Whereupon, the hearing on motion was concluded.)

U. S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

No. 5711

Sit. Wits – S. Arcar, Edgar Downs

ORIGINAL

UNITED STATES OF AMERICA

PETITION FOR NATURALIZATION

To the Honorable the .... Court of .... at ....

The petition of Jacob Voronoff hereby filed, respectfully showeth:

First. My place of residence is 723 – 4½ St. S.W. Washington (Give number, street, city or town, and State.)

Second. My occupation is Hardware merchant

Third. I was born on the 3 day of June anno Domini 1884 at Shavel

Fourth. I emigrated to the United States from Bremen, Germany on or about the 27 day of .... anno Domini 1908 and arrived in the United States, at the port of Baltimore, Md. on the 9 day of .... anno Domini 1908 on the vessel Main (If the alien arrived otherwise than by vessel, the character of conveyance or name of transportation company should be given.)

Fifth. I declared my intention to become a citizen of the United States on the 17 day of June ...., anno Domini 1........ at Washington in the Supreme Court of ....

Sixth. I am married. My wife's name is Fannie; she was born on the 24 day of July ...., anno Domini 1........ at Minsk, Russia and now resides at with me (Give number, street, city or town, and State.)

I have two children, and the name, date, and place of birth, and place of residence of each of said children is as follows:
Sadie born June 19 – 1915 at Wash. D.C. Res.
Joseph Benj. " " " 16 – 1920 " " " "

Seventh. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the present Government of Russia of whom at this time I am a subject, and it is my intention to reside permanently in the United States.

Eighth. I am able to speak the English language.

Ninth. I have resided continuously in the United States of America for the term of five years at least immediately preceding the date of this petition, to wit, since the 9 day of September, anno Domini 1908, and in the State of D.C. continuously next preceding the date of this petition, since the 9 day of October, anno Domini 1908, being a residence within this State of at least one year next preceding the date of this petition.

Tenth. I have not heretofore made petition for citizenship to any court. (~~I made petition for citizenship to the .... Court of .... at .... on the .... day of ...., anno Domini 1........, and the said petition was denied by the said Court for the following reasons and causes, to wit ...., and the cause of such denial has since been cured or removed.~~)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Labor, together with my affidavit and the affidavits of the two verifying witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Jacob Voronoff
(Complete and true signature of petitioner.)

Declaration of Intention No. 5300 and Certificate of Arrival from Department of Labor filed this 8 day of Feb. 1926

NOTE TO CLERK OF COURT.—If petitioner arrived in the United States on or before June 29, 1906, strike out the words reading "and Certificate of Arrival from Department of Labor."

AFFIDAVITS OF PETITIONER AND WITNESSES

.... } ss:
....

The aforesaid petitioner being duly sworn, deposes and says that he is the petitioner in the above-entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the said petition is signed with his full, true name; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Jacob Voronoff
(Complete and true signature of petitioner.)

Lee Rose, occupation Tax Clerk D.C., residing at ....
and Robert E. Lee, occupation Sgt. Police, residing at ....
each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known .... the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of filing his petition, since the 1 day of February, anno Domini 1........, and in the State in which the above-entitled petition is made continuously since the 1 day of February, anno Domini 1........; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that the petitioner is in every way qualified, in his opinion, to be admitted a citizen of the United States.

Lee Rose
(Signature of witness.)

Robert E. Lee
(Signature of witness.)

Subscribed and sworn to before me by the above-named petitioner and witnesses in the office of the Clerk of said Court this 18th day of February, anno Domini 1926

[SEAL]

Frank E. Cunningham, Clerk.
By Jeannette Laffel, Deputy Clerk.

18

Form 586 **CERTIFICATE OF ARRIVAL—FOR NATURALIZATION PURPOSES**

(For use of aliens arriving in United States after June 29, 1906. To be issued immediately prior to petitioning for naturalization.)

13834

U. S. DEPARTMENT OF LABOR
IMMIGRATION SERVICE

OFFICE OF Commissioner

AT Baltimore, Md., February 5, 1926.

This is to certify that the following-named alien arrived at the port indicated, on the date and in the manner described below, viz:

Name of alien: Jankel Voronoff.

Port of entry: Baltimore, Md.

Date of arrival: September 9, 1908.

Name of vessel:* "Rhein" North German Lloyd Line

Form 2814- D. C. attached.
District Director of Naturalization,
Washington, D. C.

Earl R. Pond
(Title) Assistant Commissioner

*Or railroad company, or any other conveyance.

IN THE MATTER OF THE PETITION OF

Jacob Voronoff

TO BE ADMITTED A CITIZEN OF THE UNITED STATES OF AMERICA.

Filed February 18, 1926

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the Present Government *of* Russia *of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.*

Jacob Voronoff

Subscribed and sworn to before me, in open Court, this 7th *day of* September, *A. D. 19*26

Frank E. Cunningham, Clerk.

NOTE.—In renunciation of title of nobility, add the following to the oath of allegiance before it is executed: "I further renounce the title of (give title), an order of nobility, which I have heretofore held."

ORDER OF COURT ADMITTING PETITIONER

Upon consideration of the petition of Jacob Voronoff, *and affidavits in support thereof, and further testimony taken in open Court, it is ordered that the said petitioner, who has taken the oath required by law, be, and hereby is, admitted to become a citizen of the United States of America, this* 7 *day of* September, *A. D. 19*26

(It is further ordered, upon consideration of the petition of the said ...., *that his name be, and hereby is, changed to* ...., *under authority of the provisions of section 6 of the act approved June 29, 1906 (34 Stat. L., pt. 1, p. 596), as amended by the act approved March 4, 1913, entitled "An act to create a Department of Labor.")*

By the Court:

Wendell P. Stafford, Judge.

ORDER OF COURT DENYING PETITION

Upon consideration of the petition of .... *and the motion of* .... *for the United States in open Court this* .... *day of* ...., *19*......, *it appearing that* ....

THE SAID PETITION IS HEREBY DENIED.

................, *Judge.*

MEMORANDUM OF CONTINUANCES

		REASONS FOR CONTINUANCE
Continued from	, *19*......	
to	, *19*......	
Continued from	, *19*......	
to	, *19*......	

NAMES OF SUBSTITUTED WITNESSES

................, *occupation* ...., *residing at* ....

................, *occupation* ...., *residing at* ....

Certificate of Naturalization, No. 2438080, *issued on the* 7th *day of* September, *A. D.* 1926

10/29/63 certified copy of order of court directing clerk to furnish certified copies. filed

(Here insert following dates marriages and births occurring after petitioning and before naturalization)

Form 2208

U. S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

TRIPLICATE
[To be given to the person making the Declaration]

No. 5300

FILED
NOV 4 1963
THEODORE COGSWELL
REGISTER OF WILLS, D. C.
Clerk of the Probate Court

UNITED STATES OF AMERICA

DECLARATION OF INTENTION

DOCKET

Invalid for all purposes seven years after the date hereof

United States
District of Columbia } ss:

In the [illegible] Court
of the District of Columbia

I, Yankel Voronoff, aged 35 years,
occupation Laborer, do declare on oath that my personal
description is: Color White, complexion dark, height 5 feet 6 inches,
weight 136 pounds, color of hair Brown, color of eyes grey
other visible distinctive marks None
I was born in, Town of Russia
on the ——— day of ———, anno Domini 1884; I now reside
at 708 8th St N W Washington DC
(Give number, street, city or town, and State)
I emigrated to the United States of America from Bremen Germany
on the vessel Main
(If the alien arrived otherwise than by vessel, the character of conveyance or name of transportation company should be given)
; my last
foreign residence was Town of ———; I am ——— married; the name
of my wife is Fannie; she was born at Russia
and now resides at with me.
It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign
prince, potentate, state, or sovereignty, and particularly to
The Emperor of Russia, of whom I am now a subject;
I arrived at the port of Baltimore, in the
State of Md, on or about the 15 day
of Sept, anno Domini 1908; I am not an anarchist; I am not a
polygamist nor a believer in the practice of polygamy; and it is my intention in good faith
to become a citizen of the United States of America and to permanently reside therein:
SO HELP ME GOD.

Yankel Voronoff
(Original signature of declarant)

Subscribed and sworn to before me in the office of the Clerk of
said Court this 18 day of June anno Domini 1919

[SEAL]

J. R. Young
Clerk of the [illegible] Court.
By Fred C. O'Connell, asst. Clerk.

16—1178

20

[Filed Sept. 11, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

In re:	)	
ESTATE OF JACOB VORONOFF,	)	Administration No. 107,519
Deceased.	)	

ORDER DISMISSING PETITION FOR CAVEAT

Upon consideration of the Motion to Dismiss the Petition for Caveat filed herein and other matters of record, and after argument by counsel for the respective parties, the Court finding that the Caveator, Edna Epstein, was never legally adopted as a daughter of decedent and therefore has no interest in said estate, it is by the Court this 11th day of September, 1963,

ADJUDGED and ORDERED that the Motion to Dismiss be granted and said Petition for Caveat is hereby dismissed with costs.

/s/ Edward A. Tamm
Judge

[Filed Oct. 9, 1963]

NOTICE OF APPEAL

Notice is hereby given that Edna Epstein, petitioner for caveat in the estate above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of dismissal entered in this action on September 11, 1963.

Dated: October 9, 1963.

/s/ Nathan L. Silberberg
Attorney for Appellant

* * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,236

EDNA EPSTEIN,

Appellant,

v.

SHIRLEY MESHER,

Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

ALVIN L. NEWMYER
ALVIN L. NEWMYER, JR.
900 17th Street, N. W.
Washington, D. C. 20006
Attorneys for Appellee.

QUESTIONS PRESENTED

That, in the opinion of Appellee, the questions are:

1. Is a step daughter, who is not an heir at law or next of kin in case of intestacy and who is not a devisee or legatee under a will, entitled to citation when the will is offered for probate?

2. Does the doctrine of equitable adoption apply to this case?

3. When, as here, the Trial Court made no final adjudication as to the appointment of a guardian ad litem, and no interlocutory appeal was perfected, is that subject for consideration on this appeal?

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TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,236

EDNA EPSTEIN,

Appellant,

v.

SHIRLEY MESHER,

Appellee.

Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTER STATEMENT OF THE CASE

Significant omissions in Appellant's Statement of the Case are as follows:

In her petition for caveat Appellant inaccurately alleged "that she is a daughter of Jacob Voronoff, deceased," and that "her interest will be seriously affected by the probate of said purported will" (J.A. 3). Thereafter, when required by Court order to answer specific interrogatories, she admitted that she was not a daughter of testator, but then claimed to be "a daughter of Jacob Voronoff by

adoption?/ (J.A. 7). She admitted, however, "there were no court proceedings of adoption" (J.A. 7, 12). Further, in answer to Interrogatory 9, which required her to state the facts upon which she claimed she had been legally adopted by Jacob Voronoff (J.A. 6, 7), she did not assert that Jacob Voronoff had ever agreed to adopt her.

Moreover, on February 18, 1926, when Jacob Voronoff filed his petition for naturalization in the District Court, at which time Edna Epstein was 18 years of age and unmarried (J.A. 7), he, Jacob Voronoff, made oath as follows:

> "I have two children, and the name, date and place of birth, and place of residence of each of said children is as follows: Sadie, born June 19, 1915, at Washington, D. C., and Joseph Benj. born June 16, 1920, at Washington, D. C." (J.A. 17-18).

At the hearing in the Trial Court, counsel for Appellant admitted he "was not aware, until the citation a moment ago by Mr. Newmyer, of the naturalization record" (J.A. 12). That record explicitly refutes any claim that Jacob Voronoff ever considered Edna Epstein as his daughter, or ever agreed or intended to adopt her.

STATUTES INVOLVED

> **Sec. 19-301, D. C. Code** -- Upon the filing of a petition for probate of a will, notice, as hereinafter provided, shall be issued to all persons who would be entitled to or interested in the estate of the testator in case such will had not been executed to appear in said court on a date named in the notice, and to show cause why the prayer of the petition should not be granted. . . .

> **D. C. Code (1901), Sec. 395** -- Jurisdiction is hereby conferred on any judge of the supreme court of the District of Columbia to hear and determine any petition that may be presented by a person or a husband and wife residing in the District of Columbia, praying the privilege of adopting any minor child as his or her or their own child, and making such minor child an heir at law. If the judge shall find, upon the hearing of such

petition, that the petitioner is a proper person to have custody of such child, and that the parent or parents or guardian of such child have given their permission for such adoption, he shall enter an order upon the records of the court legalizing such adoption and making such child an heir at law of such petitioner, the same as if such child was born to such petitioner. If the child has no parent or guardian the judge shall appoint a guardian ad litem. Act of February 26, 1895 (28 Stat. L., p. 687).

Title 28, USCA, as amended, Section 1292 (b) -- When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

SUMMARY OF ARGUMENT

1. A step daughter not being "entitled to or interested in the estate" has no right to citation on probate.

2. Failure to comply with the adoption statute and failure to allege an agreement to adopt preclude the theory of equitable adoption under established decisions.

3. Since the Trial Court's adjudication was without prejudice on the appointment of a guardian ad litem, that question is not involved on this appeal.

ARGUMENT

I.

A "STEP CHILD" IS NOT ENTITLED TO CITATION

Title 19-301, D. C. Code (1961 Ed.) requires citation only as to "persons who would be entitled to or interested in the estate of the testator in case such will had not been executed." Appellant fails to cite a single authority to support her contention that citation is required as against a step child. The uniform practice in the Probate Court, approved by a long line of decisions in this Court, is to the contrary.

In Norris v. Harrison, 91 U.S. App. D.C. 103, 198 F.2d 953, this Court specifically held that step grandchildren whose claim to realty rested upon an unprobated will, were not heirs at law of a deceased grantor entitled to take by descent should decedent's deed be set aside, and accordingly they lacked standing to maintain an action to set aside the deed.

It is well established that one who is not an heir at law or next of kin in case of intestacy, or a devisee or legatee under a will, has no standing to file a caveat, not being a "party in interest". Angell v. Graff, 42 App. D.C. 198; Naylor v. Mealy, 62 App. D.C. 321, 67 F.2d 693; Werner v. Frederick, 68 App. D.C. 158, 94 F.2d 627; Lonas v. Betts, 82 U.S. App. D.C. 55, 160 F.2d 281; Kimberland v. Kimberland, 92 U.S. App. D.C. 145, 204 F.2d 38.

II.

THE DOCTRINE OF EQUITABLE ADOPTION IS NOT APPLICABLE IN THIS CASE

It is well settled that the power to decree an adoption did not exist at common law and is purely a creature of statute. Re. Minor, 79 U.S. App. D.C. 191, 144 F.2d 644; Spencer v. Franks, 173 Md. 73; Besche v. Murphy, 190 Md. 539, 59 A. 2d 499.

The first adoption statute for the District of Columbia was enacted February 26, 1895, and there has been a statutory method of adoption ever since. Appellant, according to her answers to the interrogatories propounded her, was born in 1908 and was not married until April, 1928 (J.A. 7). Accordingly, the first adoption statute of 1895 was in effect at the time of her birth and there has been a prescribed statutory method of adoption to the present time.

This Court in Barnes v. Pannakker, 72 App. D.C. 39, 111 F.2d 193, announced, "In 1937 following the lead of certain State legislators Congress enacted the present adoption act". That Act does not recognize any method of adoption except as prescribed by the statute.

In 1959, in American Security and Trust Company v. Cramer, 175 F. Supp. 367, 374, the District Court in a well considered opinion refused to recognize an alleged daughter, who was referred to in testator's will as his "adopted daughter", because there had never been a legal adoption, although she was treated by testator as a natural daughter, lived with him, was referred to as daughter, her wedding invitations were in his name and she was believed generally to be a natural daughter.

In Besche v. Murphy, 190 Md. 539, 59 A. 2d 499, the relief prayed was a decree that plaintiff be regarded as the adopted child of decedent so as to be permitted to inherit. The bill was dismissed on demurrer and the dismissal affirmed by the Maryland Court of Appeals. The pleadings alleged that testator had offered to adopt the orphan and took

her when 8 years old saying we are adopting you, we will be good parents to you, and gave her their name in school, in church, and in the community and among friends, acquaintances and neighbors. She was known as their daughter. In all respects the relationship was that of natural parent and daughter and she gave all her earnings to her adopted mother and when she married the invitations were sent calling her "daughter" and correspondence was signed "Mother". In affirming the dismissal, the Maryland Court of Appeals said:

> "In this case there has been no legal adoption. The first adoption statute passed in this state was Chapter 244 of the Acts of 1892, which was before the alleged oral agreement to adopt appellant. No attempt was made to comply with that statute or its amendments and there was then and is now no other method by which a child can be adopted in this state." (Citing Spencer v. Franks, 173 Md. 73, 114 ALR 263).

Appellant relies locally on an unreported bench opinion in the Probate Court in 1952 re Estate of Finney, Administration No. 81052, in which Judge Holtzoff discusses the doctrine of equitable adoption. That case, however, arose in 1892 three years before the first adoption statute was enacted in the District of Columbia and at that time the method in vogue for adoption was by written contract. In that case there was a formal written contract of adoption dated May 30, 1892, between the Home of Foundlings in the District of Columbia and the adopting parents.

The other cases chiefly relied upon by Appellant are Missouri decisions with respect to which the Federal Court in Mutual Life Insurance Company v. Barton, 34 F. Supp. 859, 860, said "the Missouri rule is different from that of practically all the other States, as well as the common law. It authorizes a Court of Equity to enforce a parol contract of adoption where the contract has been fully performed by the child and it would be inequitable to deny adoption."

As this Court said in re. Minor, 79 U.S. App. D.C. 191, 193, supra:

"As all adoption proceedings are statutory in character, the value of cases from other jurisdictions, for purposes of interpretation, depends upon identity or close similarity of statutory provisions."

III.

APPELLANT'S REQUEST TO APPOINT A GUARDIAN AD LITEM WAS NOT ADJUDICATED BY THE TRIAL COURT AND IS NOT SUBJECT TO CONSIDERATION ON THIS APPEAL

Appellant alleged in her petition for caveat "that, upon information and belief, petitioner's brother, Joseph Voronoff, is and has been incapable of managing his own affairs or of knowing the meaning and significance of the purported will and testament as it concerns him and others."

This "information and belief" averment was a mere conclusion of law not supported by factual allegation. The source of said information and the facts upon which it was made were not set forth and the allegation itself was contradicted at the oral hearing below by appellant's counsel who there conceded that Joseph Voronoff "is an adult and he has not been, so far as I know, at any time judicially determined to be incompetent" (J.A. 15-16).

In Naylor v. Mealy (1934), 62 App. D.C. 321, 67 F.2d 693, it was held that an averment in a petition for caveat that petitioner was "a next of kin" of decedent, was a mere conclusion, not admitted by a Motion to Dismiss.

Moreover, the Trial Court in this case in dismissing Appellant's petition for caveat did not foreclose the right of the son, or of any person on his behalf, to intervene in the Probate proceedings but instead expressly stated that the dismissal of the caveat was "without any prejudice against the right of the son named by counsel to initiate such proceedings as may be desirable from his viewpoint" (J.A. 15-16).

Since the Trial Court in the final order from which this appeal has been taken did not adjudicate the question of a guardian ad litem and since there was no interlocutory appeal on that issue under Section 1292-B of Title 28, U. S. Code (1958), that issue is not involved on this appeal.

Appellant's counsel admitted on the oral argument below (J.A. 14-15) that "she has no direct standing" and "is a comparative stranger to that phase" (Brief, p. 8). It is noteworthy that although the Trial Court in its ruling September 11, 1963, reserved all rights to initiate such proceedings as may be desirable from the son's viewpoint, that no effort has been made by anyone including Appellant to question the son's competency by appropriate proceedings. It is evident, therefore, that petitioner has no basis to doubt the capacity of Joseph Voronoff, who is shown by the record herein to be a lifelong resident of the District of Columbia, 43 years of age, who has never been accused of incapacity to manage his own affairs, except by a vindictive step sister, who, for her own selfish purpose, has subjected him to the humiliation of this baseless charge.

CONCLUSION

For the foregoing reasons, the Order herein appealed from should be affirmed.

Respectfully submitted,

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